No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Bill of Complaint

MOTION FOR LEAVE TO INTERVENE OF THE CITY OF CHARLOTTE, NORTH CAROLINA, AND BRIEF IN SUPPORT OF MOTION

DEWITT F. MCCARLEY
City Attorney
H. MICHAEL BOYD
Senior Assistant City Attorney
OFFICE OF THE CITY ATTORNEY
600 East Fourth Street
Charlotte, N.C. 28202
(704) 336-2254

JAMES T. BANKS
H. CHRISTOPHER BARTOLOMUCCI*
HOGAN & HARTSON L.L.P
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

PARKER D. THOMSON
HOGAN & HARTSON L.L.P.
1111 Brickell Avenue
Suite 1900
Miami, FL 33131
(305) 459-6500

*Counsel of Record

Counsel for the City of Charlotte

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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Pursuant to this Court's Rule 17, the City of Charlotte, North Carolina, through its City Attorney, DeWitt F. McCarley, hereby moves for leave to intervene as a party defendant in this action.

INTRODUCTION

The City of Charlotte respectfully requests that it be granted leave to intervene as it has a substantial interest in this water rights dispute. Charlotte, which sits on the border between the Carolinas, is by far the largest municipality on the Catawba River and the largest provider of water supply and wastewater treatment services in the Catawba River

Basin. Therefore, and not surprisingly, Charlotte is one of the principal stakeholders in the negotiated Comprehensive Relicensing Agreement relating to Duke Energy's hydroelectric power facilities on the Catawba River.

Much of South Carolina's complaint is aimed at the North Carolina inter-basin transfer (IBT) statute and the IBTs from the Catawba River authorized under that statute, and this puts Charlotte squarely in South Carolina's crosshairs. Charlotte is the government entity in North Carolina vested with the legal authority to carry out the large majority of the IBTs to which South Carolina objects. Charlotte possesses a Certificate issued by the North Carolina Environmental Management Commission authorizing the City to execute IBTs of up to 33 million gallons per day (MGD) from the Catawba River. And Charlotte may soon be responsible for another 10 MGD of such IBTs. Given its important interests and its IBT authority, Charlotte should be allowed to take its place as a party defendant in this case.

STATEMENT

I. CHARLOTTE'S INTER-BASIN TRANSFERS AND WATER SUPPLY SERVICES ARE THE PRIMARY TARGETS OF SOUTH CAROLINA'S COMPLAINT.

A. Charlotte Is the Largest Municipality and Largest Provider of Water Supply and Wastewater Treatment Services in the Catawba River Basin.

Charlotte is the largest of 18 Metropolitan Statistical Areas in the two Carolinas, and is by far the largest provider of water supply and wastewater treatment services in the Catawba River Basin. Since 1911, when Charlotte first tapped the Catawba

River for water, the breadth of Charlotte's services has grown steadily until, in 2006, Charlotte served a population of more than 800,000 in six counties and nine towns in both North Carolina and South Carolina. Charlotte also has service connections with the City of Concord in Cabarrus County, and with Union County, enabling Charlotte to serve these areas on an emergency basis when needed. A cost-effective response to the water supply and sewage treatment services requirements of the metropolitan area's rapid expansion is likely to depend on Charlotte's system.

Charlotte's water supply service accounts for approximately 53 percent of all municipal usage of the water resources of the Catawba River Basin. Among North Carolina users, Charlotte withdraws 64 percent of the water taken from the River for municipal water supplies.

Charlotte's population, as well as its institutional, industrial, and commercial customer base, are growing rapidly. From 1987 through 2006, the population in Charlotte's service area grew from about 480,000 to more than 800,000, and the demand for treated water supplies grew from 57 MGD to 110 MGD. Recent studies project that these demands will continue to increase at an annual rate of 1.5 percent, resulting in water supply needs of 215 MGD and wastewater treatment needs of 159 MGD by 2050.

B. Charlotte Accounts for the Large Majority of the Inter-Basin Transfers About Which South Carolina Complains.

Charlotte accounts for the lion's share of the inter-basin transfers of water from the Catawba River Basin in North Carolina—the very IBTs that prompted South Carolina to bring this action. Fur-

thermore, Charlotte may in the future account for nearly all of such IBTs.

Charlotte is responsible for public water supplies to all of Mecklenburg County, which lies in the rolling terrain of the Appalachian foothills spanning the Rocky/Yadkin/Pee Dee (RYPD) and Catawba River Basins. The Catawba River forms the County's western boundary. A north-south ridgeline transects the County, leaving approximately the eastern one-third portion of the County in the RYPD Basin, which offers far less plentiful and less dependable water supplies. *See* Exhibit 1 (map of Catawba River Basin). For this reason, Charlotte relies on its Catawba River intakes and well-established system of water treatment facilities to service customers in both basins. After use, treated wastewater in the RYPD Basin is discharged to local streams and rivers rather than being piped back to the Catawba Basin for discharge. This efficient process for serving all residents of the County results in IBTs.

Since 1990, Charlotte has experienced considerable population growth in the northern and eastern portions of its service area within Mecklenburg County. Much of the increased water demand resulting from population growth in these areas arises just east of the ridgeline within the RYPD Basin. *See* Exhibit 1 (map). Especially in the northern portion of the service area, these expanding communities are located only a few miles from Charlotte's high-capacity water intake at Lake Norman on the Catawba River just west of the ridgeline. These customers cannot rely on the meager headwaters of the nearby Rocky River, and are located some 20 miles from the modest water flows of the upper reaches of the Yadkin River to the east.

In its complaint, South Carolina focuses its claims primarily on the two permits granted by North Carolina for IBTs from the Catawba River Basin to the RYPD River Basin. *See* Complaint ¶¶ 3, 20. Charlotte holds the larger (33 MGD) of these two permits. The Cities of Concord and Kannapalis hold the smaller (10 MGD) permit but, as discussed below, Charlotte may well be called upon to implement this IBT as well.

On March 14, 2002, the North Carolina Environmental Management Commission (EMC) approved Charlotte's request for an increase in its IBT authority from 16.1 MGD to 33 MGD in order to meet water supply needs in eastern Mecklenburg County through the year 2030. *See* Exhibit 2 (Environmental Management Commission, Certificate Authorizing the Charlotte-Mecklenburg Utilities to Increase Their Transfer of Water from the Catawba River basin to the Rocky River basin under the Provisions of G.S. 143-215.22I (Mar. 14, 2002)) (Charlotte IBT Certificate). The EMC found:

> [T]he transfer is necessary to supply water to the growing communities of this area. Water from the source basin is readily available and within a short distance from the service area. Therefore the transfer is a reasonable allocation to these communities. The transfer will greatly benefit these communities by providing raw water of high quality for residential and industrial purposes.

Id. at 4e. The EMC also analyzed the effect of Charlotte's 33 MGD IBT on the entire Catawba Basin, including water flows and utilization in South Carolina, and specifically found that, even with the resulting reductions in flows from Lake Wylie into South Carolina, detrimental effects on the Catawba

Basin, would be "insignificant." *Id.* at 5e. Next, the EMC considered whether communities in eastern Mecklenburg County could obtain their water from the Rocky River, and found that this option would be less feasible than Charlotte's requested IBT because it would entail the difficult task of constructing new reservoirs in a rapidly developing urban area. *Id.* at 7e. Finally, the EMC rejected the option of returning wastewater to Charlotte's McAlpine wastewater treatment plant for discharge into the Catawba Basin because the South Carolina Department of Health and Environmental Control would likely object to the increased discharges from that plant. *Id.* In the final analysis, the EMC concluded that "(1) the benefits of the proposed transfer outweigh the detriments of the proposed transfer, and (2) the detriments of the proposed transfer will be mitigated to a reasonable degree." *Id.* at 9e.

On January 10, 2007, the EMC granted a request from the Cities of Concord and Kannapolis for an IBT of 10 MGD from the Catawba Basin to the RYPD Basin to meet anticipated water needs through the year 2035. *See* Environmental Management Commission, Certificate Authorizing the Cities of Concord and Kannapolis to Transfer Water from the Catawba River and Yadkin River Basins to the Rocky River basin under the Provisions of G.S. 143-215.22I (Jan. 10, 2007). This IBT would provide approximately 15 percent of the necessary maximum daily demand expected for a population of over 400,000 in 2035. *See id.* at 2. The EMC found:

> Based on the record, the Commission finds that current water supplies are insufficient to supply the Cities of Concord and Kannapolis and their related service areas on the reasonable planning

> horizon of the year 2035. Providing water for the anticipated growth of these communities will have a major beneficial effect. The Commission projects that the water supply deficit for these areas will be about 18.32 MGD on a maximum calendar day basis in 2035. [*Id.* at 5.]

As it had for the Charlotte IBT request, the EMC analyzed the impacts of the Concord/Kannapolis request on the entire Catawba River Basin and found that detrimental effects would be "insignificant." *Id.* at 21. The EMC also examined several non-IBT alternatives and found them not to be feasible. *Id.* at 24.

While the actual method for transferring 10 MGD from Lake Norman to Concord/Kannapolis has not been selected, these Cities contemplate that purchasing treated water from Charlotte will be among the preferred options for some or all of this IBT. *Id.* at 1. Concord's corporate limits and water service area are contiguous with Charlotte's service area. *See* Exhibit 1 (map). Charlotte already has the required intake capacity at Lake Norman, and the water treatment capacity necessary to meet those Cities' needs can be added efficiently at Charlotte's Lee S. Dukes, Jr. water treatment plant. Thus, if Concord/Kannapolis select this option, Charlotte will be responsible for implementation of all of the 43 MGD of IBTs to which South Carolina objects in its complaint.

In addition, by seeking an equitable apportionment of the Catawba River and alleging that existing IBTs already exceed North Carolina's equitable share of the River's flows, *see* S.C. App. for Prelim. Inj. at 2, 5-6, South Carolina necessarily claims that existing and planned consumptive uses *within the Catawba River Basin* in North Carolina must be curtailed and

even reduced. Again, Charlotte is the principal target of South Carolina's complaint.

Municipal consumptive uses of water occur due to activities such as lawn watering, use of septic systems, evaporative cooling and product manufacturing. In 2007, Charlotte withdrew an average of 104 MGD from the Catawba River for uses *within* the Basin, and it returned an average of 69 MGD through discharges of treated wastewater to the Catawba River or its tributaries. The difference—approximately 35 MGD—represents average consumptive uses within the Catawba Basin. By 2030, it is estimated that Charlotte's maximum intra-Basin consumptive uses will be 42.2 MGD, or approximately the same amount as the combined IBTs discussed above. *See* Environmental Assessment for Charlotte-Mecklenburg Utitilies for Increase in Inter-Basin Transfer from the Catawba River Subbasin to the Rocky River Subbasin at Table 7 (prepared for the EMC by CH2M HILL, Apr. 2001).

II. CHARLOTTE HAS A SIGNIFICANT INTEREST IN THE NEGOTIATED COMPREHENSIVE RELICENSING AGREEMENT.

As part of its effort to secure a new license from the Federal Energy Regulatory Commission (FERC) pursuant to the Federal Power Act (FPA), *see* 16 U.S.C. § 797(e), for its 11 hydroelectric power facilities on the Catawba River, Duke Energy Carolinas carried out a multi-year negotiation process involving 80 stakeholders in both States to develop a Comprehensive Relicensing Agreement. *See* Comprehensive Relicensing Agreement for the Catawba-Wateree Hydro Project, FERC Project No. 2232 (Dec. 22, 2006) (CRA) (http://www.duke-energy.com/catawba-wateree-relicensing.asp). Charlotte partici-

pated throughout the process, executed the CRA along with 68 other parties, and holds one of 12 seats on the Final Agreement Committee established by the signatories. *See id.* § 26. Among the CRA's signatories are some 28 South Carolina cities, organizations, counties, water and sewer districts, businesses, commissions, residents and departments of the State of South Carolina. *See id.*, App. B (Updated Nov. 2007).

The CRA is a binding contract among the parties to it. *See id.*, Recitals, at 4-5. In their contract, the parties stated that "they are in agreement with the entirety of this Agreement." *Id.* § 1.1. The parties then set forth in great detail all of the river flows, water uses, reservoir levels and other parameters that should govern Duke's operation of its 11 projects. *See id.* §§ 2-15. With respect to water uses, the parties agreed that, based upon their modeling, the amounts of withdrawals and returns set forth in Appendix H would be accommodated if Duke released the specific flow amounts and maintained the specific reservoir levels for each project, as set forth in the Agreement. *See id.* § 5.3. Appendix H, in turn, reflects the withdrawals, consumptive uses and IBTs for which Charlotte has authority, as discussed above. *See id.*, App. H.

The CRA parties expressly set forth their "desire and expectation that the FERC will approve the Agreement * * * and issue a New License for the Project that incorporates, without material modification, the proposed License Articles in Appendix A," which reflect the substance of the CRA. *Id.* § 18.1. Giving concrete effect to this intent, the parties agreed that, with certain limited exceptions:

> [N]o Party may request or advocate, during the period of this relicensing prior to the FERC's issuance of the New License and the closure of all rehearing and administrative challenge periods, by any activity * * * any New License requirements that would, if adopted by the FERC, be an Inconsistent Act. [*Id.* § 20.1.2.]

An Inconsistent Act is defined as "any action by a Jurisdictional Body that increases the burden upon or cost or risk to a Party substantially beyond the burden, cost, or risk assumed by the Party in this Agreement, or deprives a Party of a substantial benefit promised by another Party in this Agreement * * * ." *Id.*, App. E., Definition 23. A Jurisdictional Body is defined as "any governmental body which has the authority to prevent implementation of, or to require that specific steps be followed prior to implementing any part of this Agreement or to require activities that result in an Inconsistent Act." *Id.*, App. E, Definition 24.

South Carolina has brought this action in *parens patriae*, and therefore represents all of the 28 South Carolina parties to the CRA. In its complaint, South Carolina and those parties seek an order that would reduce the amounts of consumptive uses and IBTs reflected in the CRA, and thereby increase Charlotte's burden and cost, and deprive Charlotte of substantial benefits promised by those parties.

ARGUMENT

I. CITIES MAY BE AND HAVE BEEN PARTIES AND INTERVENORS IN ORIGINAL ACTIONS.

The City of Charlotte may properly be made a party in this case. As this Court's cases reflect, cities may be and have been parties in original actions

commenced by States. *See, e.g., New Jersey* v. *City of New York*, 290 U.S. 237 (1933) (enjoining New York City from polluting the waters off the coast of New Jersey); *Georgia* v. *City of Chattanooga*, 264 U.S. 472 (1924) (granting leave to file bill of complaint seeking to enjoin Chattanooga from appropriating land owned by Georgia); *Wisconsin* v. *City of Duluth*, 96 U.S. 379 (1877) (rejecting on the merits Wisconsin's bill in chancery seeking to enjoin Duluth's diversion of the St. Louis River through a federally-funded canal); *see also Illinois* v. *City of Milwaukee*, 406 U.S. 91, 97 (1972) (concluding, in action brought by Illinois against four Wisconsin cities, that "while, under appropriate pleadings, Wisconsin could be joined as a defendant in the present controversy, it is not mandatory that it be made one"). [1]

Furthermore, in a prior original action brought by one State against another State, this Court granted a city's motion to intervene. *See Texas* v. *Louisiana*, 426 U.S. 465, 466 (1976) (noting that the City of "Port Arthur, Tex., was permitted to intervene for purposes of protecting its interests in the island claims of the United States"); *see also Texas* v. *Louisiana*, 416 U.S. 965 (1974) (order granting Port Arthur's motion). For the reasons that follow, this Court should grant the City of Charlotte leave to intervene as a party defendant in this action.

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[1] The Court in *Illinois* v. *City of Milwaukee* observed that non-exclusive original jurisdiction under 28 U.S.C. § 1251(b)(3) extends to a suit by a State against the "political subdivisions of a State." 406 U.S. at 98.

II. CHARLOTTE POSSESSES THE AUTHORITY TO CARRY OUT THE LARGEST AND MOST SIGNIFICANT INTER-BASIN TRANSFERS OF CATAWBA RIVER WATER.

1. The City of Charlotte should be a party to this original action, first and foremost, because it is the entity vested with the legal authority to carry out the largest and most significant IBTs from the Catawba River that are the focus of South Carolina's complaint. Thus, Charlotte has a major interest in defending the current IBT regime.

Charlotte possesses a Certificate, issued in 2002 by the North Carolina Environmental Management Commission, authorizing the City to execute IBTs from the Catawba River of 33 million gallons per day (MGD) on a maximum day basis. *See* Exhibit 2 (Charlotte IBT Certificate). The IBT Certificate was issued under the authority of North Carolina's former IBT statute. *See* N.C. Gen. Stat. § 143-215.22I (1993) (repealed effective Aug. 31, 2007).

South Carolina's Complaint focuses upon the 48 MGD of water authorized by North Carolina law and the EMC to be transferred from the Catawba River Basin. *See* Complaint ¶¶ 3, 20. Charlotte is authorized to carry out 33 MGD of the 48 MGD at issue and soon may be responsible for an additional 10 MGD authorization. Indeed, South Carolina specifically complains about Charlotte's IBT Certificate authorizing "the Charlotte-Mecklenburg Utilities to transfer up to 33 million gallons per day from the Catawba River Basin to Rocky River Basin, more than double the 16 million gallons per day limit that had previously applied." *Id.* ¶ 20(a). *See also* S.C. Br. in Supp. of Mot. for Leave to File Compl. at 7.

Accordingly, Charlotte has a direct and significant stake in the present controversy. As the public water supplier providing over half of the municipal water supply withdrawn from the Catawba River, Charlotte has an enormous responsibility to provide safe and adequate service, and a critical interest in defending its authority under its IBT Certificate. Charlotte's public responsibilities would be jeopardized if South Carolina's claim for equitable apportionment resulted in an injunction that would prevent Charlotte from carrying out the IBTs that its Certificate authorizes. *See* S.C. Complaint, Prayer for Relief, ¶2 (seeking injunctive relief).

That Charlotte should be a party to this action is strongly supported by New York City's party status in *New Jersey* v. *New York*, 283 U.S. 336 (1931) (*New York*). In that original action, New Jersey sued the State and City of New York in 1929 to enjoin a proposed diversion of water from the Delaware River "in order to increase the water supply of the City of New York." *Id.* at 342. [2] New York City was present in the case, this Court explained, "since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey." *New Jersey* v. *New York*, 345 U.S. 369, 375 (1953) (*per curiam*). "New Jersey joined the City of New York as a defendant, because the City, acting under State authority, was planning the actual diversion of the water for its use." *Id.* at 370-371.

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[2] The Commonwealth of Pennsylvania promptly moved for leave to intervene, and this Court granted the motion in January 1930. *See New Jersey* v. *New York*, 280 U.S. 528 (1930) (order).

So too here. Charlotte is the dominant "authorized agent for the execution of the sovereign policy" at issue, *i.e.*, the inter-basin transfers of Catawba River water, and it is Charlotte that, "acting under State authority," is responsible for the largest and most significant "actual diversions of water" (current and planned) that South Carolina claims are injurious.

In *New York*, New Jersey sought to prevent diversions of water from the Delaware River to New York City. It would have made little sense for that action to proceed without New York City as a party defendant. In this action, South Carolina seeks to prevent inter-basin transfers of water from the Catawba River—transfers predominately carried out by the City of Charlotte. It makes little sense for this action to proceed without Charlotte as a party defendant. [3]

To be sure, New York City, unlike Charlotte, "was forcibly joined as a defendant to the original action." *Id.* at 375. But that does not answer the question whether Charlotte should be permitted to join the action as a willing defendant. The instant action is incomplete without Charlotte.

Missouri v. *Illinois*, 180 U.S. 208 (1901), provides further support for affording Charlotte party status. In that original action, Missouri filed a bill of complaint against Illinois and the Sanitary District of the City of Chicago seeking to enjoin those two defendants from discharging sewage into the Mississippi River. Ruling on a demurrer to the bill, this

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[3] The decree entered by the Court in 1931 restrained New York City as well as New York State. *See New Jersey* v. *New York*, 283 U.S. 805 (1931). If any decree entered in this action is to bind the City of Charlotte, as a practical matter the City should be a party to the litigation.

Court deemed both Illinois and the Chicago Sanitary District to be proper party defendants. With respect to the Chicago Sanitary District, this Court commented that it "is an agency of the state to do the very things which, according to the theory of the complainant's case, will result in the mischief to be apprehended." *Id.* at 242. Exactly the same can be said here of the City of Charlotte.

2. It is true that this Court, in 1953, denied the City of Philadelphia's motion to intervene in *New York*. *See id.* at 372-375. [4] But the Court had compelling reasons to deny Philadelphia's motion to intervene that do not apply to Charlotte.

First, Philadelphia, unlike New York City, was not "the authorized agent for the execution of the sovereign policy which threatened injury." *Id.* at 375. Charlotte is. This Court recognized the distinction, and based on it rejected Philadelphia's argument that New York City's presence in the case was a reason to allow Philadelphia to intervene. *See id.* at 374-375. Here, Charlotte's "position in the case," *id.* at 375, is close to the position of New York City, not Philadelphia.

Second, Philadelphia sought to intervene more than twenty years too late. New Jersey filed suit against the New York defendants in 1929, Pennsylvania intervened in 1930, and this Court entered its

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[4] Although the Court denied Philadelphia's motion to intervene, the issue presented by the motion was sufficiently important and close that the Court scheduled oral argument on the motion. *See New Jersey* v. *New York*, 344 U.S. 932 (1953) (order). Two Justices dissented from the Court's decision to deny intervention. *See* 345 U.S. at 375-376 (Jackson, J., dissenting).

original decree in 1931. Philadelphia did not move to intervene until 1952—more than two decades after each of these events. *See id.* at 370-374. [5] Here, this Court granted South Carolina leave to file its bill of complaint on October 1, 2007, and appointed a Special Master on January 15, 2008. Thus, Charlotte's motion to intervene is timely. *See* Part IV, *infra*.

III. CHARLOTTE SHOULD NOT BE DENIED PARTY STATUS SIMPY BECAUSE NORTH CAROLINA IS A DEFENDANT.

In *New York*, this Court stated that "[a]n intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." 345 U.S. at 373. In this case, the City of Charlotte should not be barred from joining this litigation as a party defendant merely because the State of North Carolina is already such a party.

To begin with, the force of the *New York* principle (it cannot be called a rule) is not strong. *New York* itself proves as much. The Court could have required New York City to show cause why it should not be dismissed from the case due to the presence of New York State in the litigation. It did not do so.

Furthermore, the Court has not always applied the *New York* principle or required an intervenor city to

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[5] Philadelphia filed its motion to intervene on December 13, 1952, eight months after New York City, supported by New York State, had moved on April 1, 1952, to modify in certain respects the 1931 decree.

make the showing suggested in *New York*. In *Texas* v. *Louisiana*, *supra*, this Court permitted the City of Port Arthur, Texas, to intervene even though Texas was already a party. *See supra* at 11. Port Arthur did not attempt to make the showing suggested in *New York*, and this Court granted Port Arthur's motion to intervene without asking it to do so.

In any event, Charlotte has "a compelling interest in [her] own right, apart from [her] interest in a class with all other citizens and creatures of the state." *New York*, 345 U.S. at 373. As shown above, Charlotte is not only the largest municipality and provider of water supply services in the Catawba River Basin but holds the IBT certificate authorizing the largest and most significant inter-basin transfers of the Catawba River. As such, Charlotte clearly is not "in a class with all other citizens and creatures of the state." There are other municipalities along the Catawba River, but Charlotte's size and IBT Certificate place her in a class by herself.

Finally, Charlotte's interest is not a carbon copy of North Carolina's. *Cf. New York*, 345 U.S. at 374 (Philadelphia was "unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests."). There are two material differences between Charlotte's interest and North Carolina's.

1. North Carolina as *parens patriae* must represent the interests of all water users in the State along the Catawba River, including municipal users upstream of Charlotte whose interests may not be aligned with Charlotte's interests. Charlotte's inter-

est, meanwhile, is exclusively that of a downstream water user.

The Eighth Circuit in *South Dakota* v. *Ubbelhohde*, 330 F.3d 1014 (8th Cir. 2003) (*South Dakota*), *cert. denied*, 541 U.S. 987 (2004), addressed a very similar situation. There, the State of South Dakota sued the U.S. Army Corps of Engineers over the Corps' decisions with respect to the release of water from reservoirs on the Missouri River. The State of Nebraska moved to intervene, but the District Court denied the motion. Relying on the *parens patriae* principle, the District Court ruled that Nebraska's interests were adequately represented by the Corps.

The Eighth Circuit reversed and held that Nebraska was entitled to intervene as a matter of right. Addressing *parens patriae*, the Eighth Circuit observed that "[t]he Corps is charged with managing the Missouri River system as a whole—a charge that requires it to balance the interests of upstream and downstream users. The proposed intervenors, on the other hand, wish to represent exclusively downstream interests." 330 F.3d at 1025. In light of the Corps' charge to represent both upstream and downstream users, the Eighth Circuit reasoned that the *parens patriae* principle was not a bar to Nebraska's intervention. As the Eighth Circuit stated:

> South Dakota asks this Court to hold that the Corps will adequately represent downstream users. We decline to do so. Given that the Corps is asked to balance multiple interests, we conclude that it cannot adequately represent the interests of downstream users in this case. The *parens patriae* presumption, therefore does not present an obstacle to intervention. [*Id.*]

See also Alabama v. *U.S. Army Corps of Eng'rs*, 229 F.R.D. 669, 675 (N.D. Ala. 2005) (*Alabama*) (following *South Dakota* and permitting the City of Montgomery, Alabama, water board to intervene in water rights litigation despite the objection that the State of Alabama stood in a *parens patriae* relationship to the intervenor).

South Dakota and *Alabama* illustrate one clear difference between Charlotte's interest and North Carolina's. Charlotte sits on the border between North Carolina and South Carolina, and the City's service area extends downstream of all other North Carolina users of the Catawba River. North Carolina—like the Corps in *South Dakota*—must "balance [the] multiple interests" of all "upstream and downstream users" of the River in the State whereas Charlotte's interests are "exclusively downstream." *South Dakota*, 330 F.3d at 1025.

2. Charlotte has a strong interest in securing the benefits promised by the 28 South Carolina parties that signed the CRA. So too does the State of North Carolina. Unlike Charlotte, however, North Carolina has duties under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, that kept North Carolina from assenting to the precise magnitude and timing of uses and IBTs delineated in the CRA for the benefit of Charlotte and its water supply customers.

Section 401 requires States to certify that federal licenses for activities resulting in discharges into navigable waters—such as the FPA license for which Duke has applied—"will not violate certain water quality standards, including those set by the State's own laws." *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1846 (2006). In recognition of

North Carolina's Section 401 duties, the CRA provides that nothing in it shall affect or limit North Carolina's authority "pursuant to 33 U.S.C. § 1341, and related state statutes and rules, to issue a water quality certification, or to alter its water quality certification, with whatever conditions the State of North Carolina * * * determine[s] should be included." CRA § 19.3. The CRA also provides that, for purposes of discharging its "rights, duties and responsibilities under 33 U.S.C. § 1341, the State of North Carolina * * * do[es] not assent to any fact, opinion, approach, methodology, and principle, expressly identified or otherwise implied in this Agreement." CRA § 19.3. Charlotte is not constrained in this fashion by the CRA or Section 401. Accordingly, Charlotte's interest in defending and securing the full range of benefits under the CRA is not subject to duties imposed by Section 401.

IV. CHARLOTTE'S MOTION TO INTERVENE IS TIMELY.

Charlotte's motion to intervene is timely because this original action is still at a preliminary stage. On October 1, 2007, the Court granted South Carolina's motion for leave to file a bill of complaint. On November 30, 2007, Duke Energy Carolinas, LLC, and the Catawba River Water Supply Project filed motions to intervene; those motions remain pending. On January 15, 2008, the Court appointed a Special Master and referred to her the pending motions to intervene. Given the limited proceedings that have taken place to this point, Charlotte's motion is timely. *Cf. Alabama*, 229 F.R.D. at 672 (motions to intervene were timely, even though "the case before the court is fifteen years old," because "[t]he court has not yet conducted proceedings on the merits of

the case, and the movants' intervention will not delay the proceedings").

CONCLUSION

For the foregoing reasons, the City of Charlotte's motion for leave to intervene should be referred to the Special Master and should be granted.

Respectfully submitted,

DEWITT F. MCCARLEY
City Attorney
H. MICHAEL BOYD
Senior Assistant City Attorney
OFFICE OF THE CITY ATTORNEY
600 East Fourth Street
Charlotte, N.C. 28202
(704) 336-2254

JAMES T. BANKS
H. CHRISTOPHER BARTOLOMUCCI*
HOGAN & HARTSON L.L.P
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

PARKER D. THOMSON
HOGAN & HARTSON L.L.P.
1111 Brickell Avenue
Suite 1900
Miami, FL 33131
(305) 459-6500

*Counsel of Record

Counsel for the City of Charlotte

FEBRUARY 2008

EXHIBITS

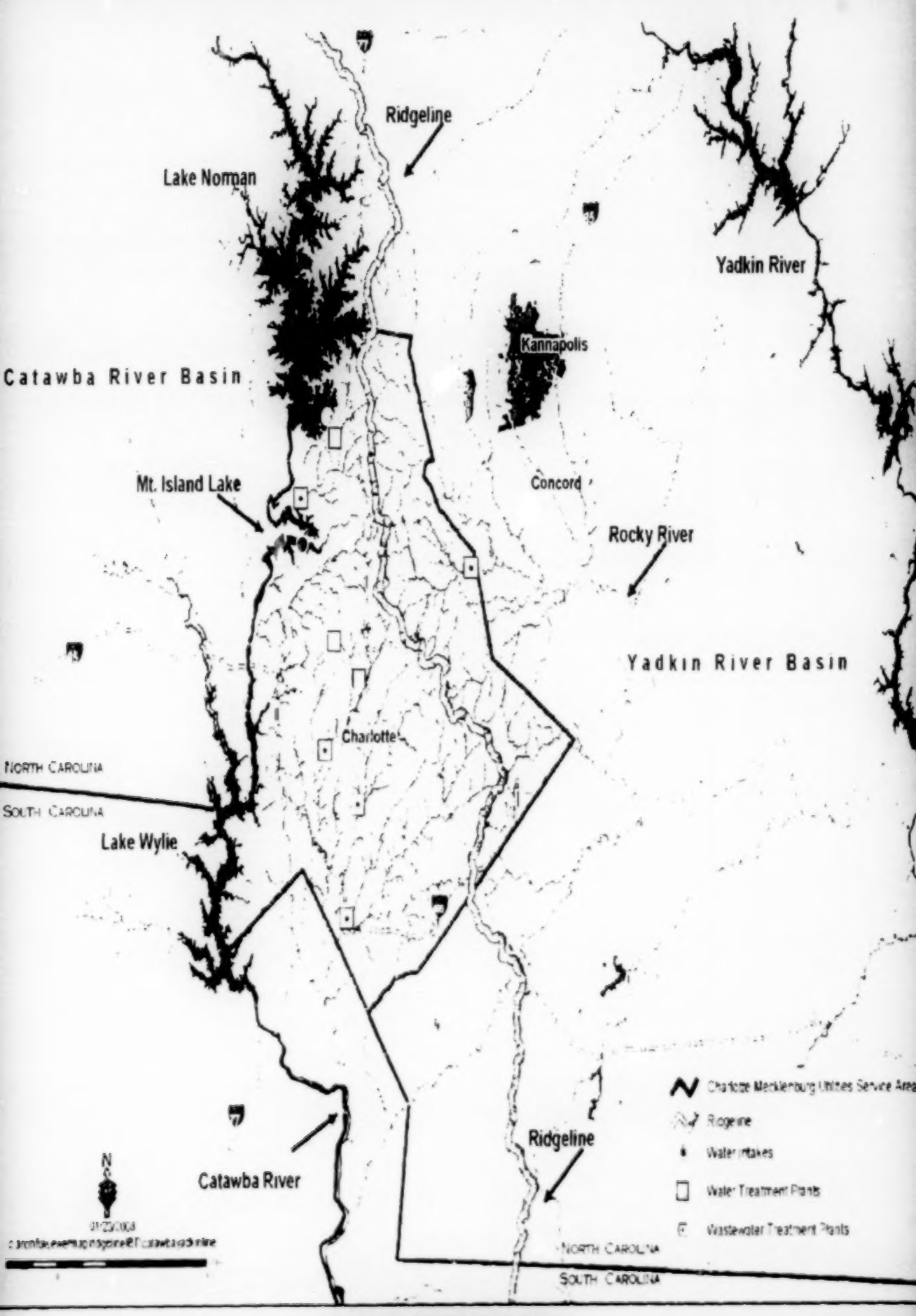

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EXHIBIT 2

ENVIRONMENTAL MANAGEMENT COMMISSION

Certificate Authorizing the Charlotte-Mecklenburg Utilities to Increase Their Transfer of Water from the Catawba River basin to the Rocky River basin under the Provisions of G.S. 143-215.22I

In August 2001, the Charlotte-Mecklenburg Utilities (CMU) petitioned the Environmental Management Commission (EMC) for an increase in interbasin transfer (IBT) from the Catawba River Basin to the Rocky River Basin. CMU requested an increase from the grandfathered IBT of 16.1 million gallons per day (mgd) to 33 mgd (maximum day basis). The proposed IBT is based on additional water withdrawals from Lake Norman and Mountain Island Lake in the source basin (Catawba River Basin). The IBT will increase due to transfer of the water to the receiving basin (Rocky River Basin) via consumptive use in eastern Mecklenburg County and existing discharges at Mallard Creek Wastewater Treatment Plant [WWTP] and Water and Sewer Authority of Cabarrus County's [WSACC] Rocky River Regional (RRR) WWTP. CMU requested an increase to 33 mgd, will allow CMUD to meet projected water supply demands through the year 2030 in eastern Mecklenburg County. *This IBT does not include transfers associated with water or wastewater service provided to the Goose Creek watershed in the Town of Mint Hill in Mecklenburg County.* Public hearings on the proposed transfer increase were held in Huntersville on December 11, 2001 pursuant to G.S. 143-215.22I.

The EMC considered the petitioner's request at its regular meeting on March 14, 2002. According to

G.S. 143-215.22I (g), the EMC shall issue a transfer certificate only if the benefits of the proposed transfer outweigh the detriments of the proposed transfer, and the detriments have been or will be mitigated to a reasonable degree.

The EMC may grant the petition in whole or in part, or deny it, and may require mitigation measures to minimize detrimental effects. In making this determination, the EMC shall specifically consider:

1. The necessity, reasonableness, and beneficial effects of the transfer.
2. Detrimental effects on the source river basin.

2a. The cumulative effect on the source major river basin of any water transfer or consumptive water use.

3. Detrimental effects on the receiving basin.
4. Reasonable alternatives to the proposed transfer.
5. Use of impounded storage.
6. Purposes and water storage allocations in a US Army Corps of Engineers multipurpose reservoir.
7. Any other facts or circumstances necessary to carry out the law.

In addition, the certificate may require a drought management plan. The plan will describe the actions a certificate holder will take to protect the source basin during drought conditions.

The members of the EMC reviewed and considered the complete record which included the hearing officer's report, staff recommendations, the applicant's petition, the Final Environmental

Assessment, the public comments relating to the proposed interbasin transfer, and all of the criteria specified above. Based on that record, the Commission makes the following findings of fact.

Finding of Fact

THE COMMISSION FINDS:

(1) **Necessity, Reasonableness, and Benefits of the Transfer**

The proposed transfer will provide water to Mecklenburg County, City of Charlotte, and other communities in the county. The current population served is about 636,000 with a maximum day water use of about 154 million gallons per day (mgd). Projections assume a 2.6 percent annual increase through 2010 decreasing to 1.3 percent by 2030. The projected 2030 serve population is 1,101,000 with a maximum day water use of about 245 mgd.

The western boundary of Mecklenburg county includes Lake Norman and Mountain Island Lake which are CMU's two water sources. CMU's current combined withdrawal capacity from both lakes is adequate to meet average day demands until about 2020. CMU has requested an increase from the Federal Energy Regulatory Commission (FERC) to increase their Mountain Island Lake withdrawal capacity. The requested increase from 165 mgd to 330 mgd (instantaneous maximum) will meet projected 2030 demands and add pumping flexibility.

The transfer of water will benefit the Mecklenburg County region by guaranteeing water to support the economic development and associated population growth that has occurred and projected to occur in this region of the State.

Based on the record the Commission finds the transfer is necessary to supply water to the growing communities of this area. Water from the source basin is readily available and within a short distance from the service area. Therefore the transfer is a reasonable allocation to these communities. The transfer will greatly benefit these communities by providing raw water of high quality for residential and industrial purposes.

(2) **Detrimental Effects on the Source Basin**

In order to assess the direct impacts of the proposed transfer on the source basin, the petitioners utilized Duke Energy's Hydro-Electric Operations and Planning Model of the Catawba-Wateree Project. The Catawba-Wateree model simulates reservoir operations and withdrawals from Lake James in North Carolina to Lake Wateree in South Carolina (see the following figure the *Catawba-Wateree River System*). Details of the modeling analysis are included in this report Part V Applicant Supplemental Information.

[IMAGE OMITTED]

As required under G.S. 143-215.22I(f)(2), local water supply plans were considered in developing the model. In addition, industrial and agricultural withdrawals were model inputs. Model runs were evaluated for present conditions, 2030 CMU water demands, and cumulative 2030 water demands.

As seen in the following table, a summary of daily releases from Lake Wylie, the transfer will have minimal impact on low flows. Similarly the model results show minimal impacts to both lake levels and hydropower generation.

[TABLE OMITTED]

Based on the modeling results the Commission finds that the detrimental effects on the source basin described in G.S. §143-215.22I(f)(2) will be insignificant.

(2a) **Cumulative effect on Source Basin of any transfers or consumptive water use projected in local water supply plans**

Local water supply plan data, including current and projected water use and water transfers, were used to develop the input data sets for the model discussed in Finding Number 2. The model was used to evaluate current and future scenarios of basin water use.

The safe yield of the reservoir system has not been determined. Duke Power does not have a policy on reallocation of power pool storage to water supply, for example unlike the Corps of Engineers. However, based on two 2030 model scenarios and current drought operations, the safe yield is at least as large or larger than the cumulative 2030 scenario of 624 mgd.

Based on the modeling discussed in Finding No. 2, the Commission finds the cumulative effects of this and other future water transfers or consumptive uses as described in G.S. §143-215.22I(f)(2a) will be insignificant.

(3) **Detrimental Effects on the Receiving Basin**

The proposed transfer will utilize existing permitted wastewater discharges to the Rocky River basins; therefore no additional permitted capacities will be required. Previous studies for the existing plant indicated no significant direct water quality or wastewater assimilation on the receiving stream. Additional growth and development in the receiving

basin may impact water quality, stormwater runoff, frequency and intensity of flooding, and land use.

The Goose Creek watershed in Mecklenburg County was removed from the area to be served by this transfer certificate until the impacts of additional urban growth on Federally listed endangered mussel specifies are fully evaluated.

Based on the record the Commission finds the transfer will support continued population growth and the attendant impacts of that growth. These impacts include effects on wastewater assimilation, fish and wildlife habitat, and water quality. However, these impacts will be minimal. Reasonable mitigation includes:

1. *Require the County to evaluate the feasibility of each element of the Surface Water Improvement and Management Program (SWIM) on an annual basis.*
2. *Require the County and the Town of Mint Hill to consider the conclusions of Wildlife Resources Commission's Goose Creek watershed study when complete.*
3. *Require Mecklenburg County and the City of Charlotte to continue the stakeholder process to investigate water quantity control from single-family development and water quality control for all development.*
4. *The Goose Creek subbasin in Mecklenburg County is removed from the area to be served by the IBT. A moratorium on the installation of new IBT water lines into Goose Creek subbasin is in effect until the impacts of additional growth urban growth on the endangered specifies are fully evaluated.*

(4) **Alternatives to Proposed Transfer**

The petitioners evaluated three alternatives to the proposed transfer. The alternatives considered included:

1. No Action – Growth would be served by individual wells and septic tanks. The region is already experiencing water quality problems related septic tanks and package sewage plants. Also, a number of individual wells in this region have both low yields and poor water quality.
2. Obtain Water from the Rocky River – New reservoir project. Development of new impoundments for water supply in rapidly developing urban area face significant regulatory requirements and considerable public controversy.
3. Return wastewater discharge to the Catawba – Return wastewater to the McAlpine WWTP. Returning water to the Catawba would increase McAlpine's discharge by 17 mgd. SC DHEC considers the McAlpine plant to be a significant contributor to phosphorus in the Catawba basin already at it's current discharge level.
4. Proposed Action. The proposed action of using the Mallard Creek WTTP and the Rocky Regional WTTP increases the existing discharge of 8 mgd to 18 mgd by 2030 into the Rocky River.

Based on the information provided in the EA and the petition, the Commission finds that the proposed alternative is the most feasible means of meeting the petitioners' long-term water supply needs while minimizing overall impacts and cost.

(5) **Impoundment Storage**

This criterion is not applicable, as the petitioners do not have an impoundment.

(6) **The water to be withdrawn or transferred is stored in a multipurpose reservoir constructed by the United States Army Corps of Engineers**

This criterion is not applicable, as the petitioners are using storage in Duke Power reservoirs.

(7) **Other Considerations**

The Commission finds that to protect the source basin during drought conditions, to mitigate the future need for allocations of the limited resources of this basin, and as authorized by G.S. § 143-215.22I(h), a drought management plan is appropriate. The plan should describe the actions that the Charlotte-Mecklenburg Utilities will take to protect the Catawba River Basin during drought conditions.

The Commission notes that future developments may prove the projections and predictions in the EIS to be incorrect and new information may become available that shows that there are substantial environmental impacts associated with this transfer. Therefore, to protect water quality and availability and associated benefits, modification of the terms and conditions of the certificate may be necessary at a later date.

Decision

Based on the hearing record and the recommendation of the hearing officers, the Commission, on March 14, 2002 by duly made motions concludes that by a preponderance of the

evidence based upon t. Findings of Fact stated above that (1) the benefits of the proposed transfer outweigh the detriments of the proposed transfer, and (2) the detriments of the proposed transfer will be mitigated to a reasonable degree. Therefore, and by duly made motions, the Commission grants the petition of the Charlotte-Mecklenburg Utilities (with conditions) to increase their transfer of water from the Catawba River basin to the Rocky River basin. The permitted transfer amount shall be 33 million gallons per day (mgd) on a maximum day basis from the effective date. This certificate is effective immediately. The certificate is subject to the following conditions, imposed under the authority of G.S. § 143-215.22I:

1. Require Mecklenburg County to summarize progress in implementation of watershed management approaches of the Surface Water Improvement and Management Program (SWIM) on an annual basis. The Division of Water Resources shall have the authority to approve modifications to and need for continued reporting as necessary.

2. Require Mecklenburg County and the City of Charlotte to continue the stakeholder process to investigate water quantity control from single-family development and water quality control for all development until completed. To accomplish this end, the stakeholder group should consider evaluating the feasibility of single-family detention and recommending ordinance revisions based on technical, political, long-term maintenance, cost, and benefits related to the proposed ordinance changes.

3. The Goose Creek subbasin in Mecklenburg County is removed from the area to be served by the IBT. A moratorium on the installation of new interbasin transfer water lines (water lines crossing the ridgeline) into Goose Creek subbasin is in effect until the impacts of additional growth urban growth on the endangered species are fully evaluated. This moratorium will not impact Charlotte-Mecklenburg Utility's ability to fully utilize existing water lines. The Division of Water Resources shall have the authority to grant exemptions for reasons of public health and safety for dwellings existing on or before March 14, 2002.
4. If either the EA is found at a later date to be incorrect or new information becomes available such that the environmental impacts associated with this transfer are substantially different from those projected impacts that formed the basis for the above Findings of Fact and this certificate, the Commission may reopen the certificate to adjust the existing conditions or require new conditions to ensure that the detriments continue to be mitigated to a reasonable degree.
5. Require the applicant to develop a compliance and monitoring plan for reporting maximum daily transfer amounts, compliance with certificate conditions, progress on mitigation measures, and drought management activities. The Division of Water Resources shall have the authority to approve modifications to the compliance and monitoring plan and drought management plan as necessary.

This is the 14th day of March, 2002.

/s/ DAVID H. MOREAU

David H. Moreau, Chairman